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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-277

FRED J. ZEEHANDELAAR,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Fred J. Zeehandelaar, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered against him on May 7, 1975 (Petition for Rehearing and Rehearing *en banc* denied July 23, 1975), which affirmed the judgment of conviction previously entered against him in the United States District Court for the Southern District of New York.

Opinion Below

The Court of Appeals affirmed the judgment of conviction without opinion, *United States* v. *Zeehandelaar*, 516 F.2d 897 (2d Cir., 1975). The order of affirmance, however, remanded the case to the District Court for correction of an improper sentence (Appendix A, *infra*, at

1a-2a*). A prior judgment of conviction of petitioner had been reversed by the Court of Appeals in an opinion, *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir., 1974). That opinion of the Court of Appeals is reproduced as Appendix D, *infra*, at 5a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on May 7, 1975 (1a). Rehearing (3a) and Rehearing *en banc* (4a) were both denied on July 23, 1975.

Questions Presented for Review

Petitioner has been convicted of making a false material declaration during his testimony at a prior trial in which he was the defendant (18 U.S.C. § 1623). He was sentenced to a one year period of unsupervised probation and, as a condition of probation, he was ordered to pay $5,000 to the Department of the Interior for use in connection with the preservation of endangered species. On appeal, the Court of Appeals held the sentence to be improper and ordered that petitioner be resentenced and directed that "any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed" (2a).

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* References herein to the Appendix to this Petition are as follows: " -a". References preceded by "A" are to the Appellant's Appendix filed in the Court of Appeals with respect to the instant appeal. Petitioner's conviction herein was with respect to allegedly perjurious testimony given by him at a prior trial in which he was the defendant. He was convicted at that trial, but, as hereinafter noted, that judgment of conviction was reversed by the Court of Appeals, *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir., 1974). References preceded by "B" are to the Appendix filed in the Court of Appeals with respect to that prior appeal.

1. Was petitioner deprived of his Fifth Amendment rights to indictment by a grand jury and to due process of law where:

(a) the trial court, over defense objection, permitted an amendment of the indictment which materially changed the substance, theory and text of the allegations of perjury?

(b) the text of the grand jury indictment, both as filed and as amended, was confused, misleading and ambiguous in its specification of perjury?

2. Was petitioner deprived of a fair trial by comments of the prosecutor, in summation, which placed his own credibility in issue, vouched for the credibility of prosecution witnesses, and utilized alleged facts which had not been the subject of proof?

3. Where, on appeal, the Court of Appeals found that the forced contribution to the Department of the Interior was an improper sentence, would it be an improper increase of the sentence for the District Court to subsequently substitute an equivalent criminal fine in place of the illegal provision?

Constitutional Provision Involved

FIFTH AMENDMENT:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutory Provision Involved

18 U.S.C. § 1623. FALSE DECLARATIONS BEFORE GRAND JURY OR COURT

(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this

subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Added Pub.L. 91—452, Title IV, § 401(a), Oct. 15, 1970, 84 Stat. 932.

Statement of the Case

Petitioner, Fred J. Zeehandelaar [hereinafter, "Petitioner"] is an importer of wild animals. In December, 1971, there existed a belief that the Department of Interior, Bureau of Sport Fisheries and Wildlife, [hereinafter, "The Bureau"] might soon place the cheetah on the endangered species list. If that eventuality were to come about, importation of cheetahs would no longer be permitted unless it could be shown that there was a pre-existing importation contract or that the importation was for the purpose of propagation (A. 14-15).

A. The False Statement Prosecution

On June 8, 1972, petitioner applied for an importation permit and attached to his application two documents which he has since admitted were backdated. Although, in October, 1972, the application was withdrawn, peti-

tioner was thereafter indicted upon the charge of making false statements to a government agency (18 U.S.C. § 1001).

At the trial, the government attempted to prove under the "similar act" theory that, on a different occasion, unrelated to the facts of the indictment, Zeehandelaar had offered to backdate a contract for the purpose of circumventing the importation prohibition. Two government witnesses, Melvin Lovell and Frank Gilbert, testified with respect to the facts surrounding that alleged offer. Petitioner testified in his own behalf and denied making such an offer.*

Although petitioner was convicted as to the false statement charge, the Court of Appeals reversed the conviction upon the ground that the indictment and the Court's instructions to the jury did not make clear whether petitioner was charged with falsely stating that he had a bona fide prepublication contract (which he clearly did have) or with falsely submitting backdated documents. *United States* v. *Zeehandelaar*, 498 F.2d 352 (2d Cir., 1974) (5a-17a).

B. The Perjury Prosecution

Following the reversal of the false statement conviction, the government sought a superseding indictment from the September, 1974 grand jury, charging the petitioner with the previously charged false statement (Count 1) and with having given perjurious testimony at the first trial (Count 2). The grand jury refused to indict and voted a "no true bill" (A. 127-133, 169, 141-2, 145).

---

* As will hereinafter be shown, that denial as to a collateral fact, led to petitioner's indictment and conviction for perjury. That conviction is the subject of this petition for a writ of certiorari.

On October 1, 1974, the government re-presented the case, but to a different grand jury—the October, 1974 grand jury. The grand jury returned the requested indictment on October 2, 1974 (A. 155).*

C. The Allegedly Perjurious Testimony

Both Melvin Lovell and Frank Gilbert testified at the perjury trial. Lovell claimed that his first contact with the petitioner was on April 15, 1972, when he placed a telephone call to the petitioner who was attending a conference of zoo directors in Tucson, Arizona. Lovell's version of that conversation is that he merely indicated to the petitioner that he wished to obtain a pair of cheetahs, and it was arranged that the two men would meet in Tucson to further discuss the matter (A. 511). At the false statement trial, when questioned about that telephone conversation, petitioner responded that, during the course of the conversation, he told Lovell about the requirements which must be met by the permittee, and that:

> "I told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovell, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the endangered species list.
>
> "Since we didn't have such a contract, since he didn't and I didn't have such a contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.

---

* Between the two presentations, the Court denied a defense request that the second grand jury be advised that the first grand jury had voted a "no true bill." The second grand jury was never given that information (A. 41-2, 145).

"He then asked me what if I sign a contract dated in March. And I said 'Sorry, that can't be done.'

"The conversation ended by me telling him that since he is in Phoenix, and identified myself as being in Tucson, Arizona, which is only 65 miles, 70 miles away, I advised him that I would be on the program in the Phoenix Zoo on an organized tour on Tuesday, April 18, and I suggested to him that if he wants to talk to me again he might take the opportunity of looking me up while we were at the Phoenix Zoo.

"That was the end of the conversation.

"Q. The telephone conversation?
"A. The telephone conversation" (B. 380-1).

Gilbert was not a party to or even present with Lovell during the above noted telephone conversation. Following the conversation, Lovell contacted Gilbert and the two men travelled to the Arizona Inn in Tucson, where the petitioner was staying. They encountered petitioner in the lobby.

Lovell's testimony is that during the conversation in the lobby, petitioner suggested that the two cheetahs could be obtained by backdating an order so as to make it appear that it had been written prior to the effective date of the importation restriction. Lovell claims that he rejected the proposal and that all contact with petitioner was terminated (A. 522).

Gilbert, who also testified as a government witness, only recalled that the meeting had occurred, but could not recall any offer by petitioner to backdate an order or to engage in any other deceptive device. He did recall that petitioner was in a rush to get to another meeting (A. 698-712).

It is clear, therefore, that the perjury trial was a credibility contest between the petitioner and Lovell. Both men differed as to the contents of each of the two conversations. Lovell claimed that the telephone conversation was innocuous; petitioner claimed that *Lovell* had made an improper backdating suggestion during the conversation, which petitioner rejected. Petitioner, supported by Lovell's friend, Gilbert, claimed that the lobby conversation was innocuous; Lovell claimed that, during the lobby conversation, petitioner had made an improper backdating suggestion.

D. The Perjury Indictment

The specification of perjury charged in the indictment sets forth an edited version of the actual testimony given by the petitioner at the prior trial. Indeed, the fact that the testimony was edited is not apparent from an examination of the indictment.* Moreover, prior to trial, the trial court at the request of the prosecutor and over the objection of the defense, redacted the testimony specified in the perjury count by striking three questions and three answers, leaving two questions and two answers.

The indictment, as drawn, made it appear that the petitioner had perjured himself with respect to his testimony concerning the substance of his *telephone* conversation with Lovell. The indictment as amended eliminated references to the telephone conversation. The net effect of this successive tinkering with the petitioner's actual testimony was that the grand jury was made to believe that it was indicting the petitioner for perjurious testimony relating to his version of the telephone conversation.

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* The government has conceded that the indictment presented to the grand jury failed to indicate that the petitioners' testimony had been edited (Government's Brief in the Court of Appeals, at p. 13, fn. and accompanying text).

By the redaction of the indictment, the government removed those portions of the testimony which showed that petitioner had been testifying about the telephone conversation. By this device, the government was able to try its case and argue to the jury that petitioner's specific recitation of the conversation related to the meeting in the lobby of the Arizona Inn.

For purposes of demonstration, we shall now set forth the testimony as it appears in the transcript of the first trial. The material not included in the indictment's version of the testimony is contained in brackets. The material stricken by the court is in plain face type, and the material which remained in the amended indictment is italicized (B. 336-341; A. 6, A. 9).*

> "Q. Whom did you phone and what number did you call?
>
> "A. I telephoned Mr. Lovell at this number, 6—area code 602—937-6330.
>
> "Q. And what conversation did you have with him?
>
> [**"A. I introduced myself. I said, 'Mr. Lovell, I have just been advised that you called my office and you told my office this same message'—and I repeated the same contents—'I am calling you back. What can I do for you?'**
>
> [**"And he then said—do I continue?**
>
> [**"The Court: The entire conversation, if you would.**

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* We have annexed hereto as Appendix E a chart which was provided to the Court of Appeals as part of Appellant's Reply Brief. The first column of the chart shows petitioner's actual testimony. The second column of the chart shows that testimony which was included in the indictment as returned by the grand jury. The third column of the chart shows that portion of the testimony which remained after the indictment was redacted by the trial court.

[“A. He then said ‘What is the approximate price?’

[“And I said ‘The approximate price is between’—as I recall at this moment—‘17 and $1900 each delivered to the United States.’

[“He then said again ‘I visited U.S.D.I. yesterday and gave the same story.’

[“I then questioned his qualifications to obtain what he described to be a zoological import permit.

[“I told him that a zoological import permit, which is not the same as a commercial import permit, would require certain qualifications, facilities, et cetera, et cetera, facilities, housing, for the U.S.D.I. to grant him such a zoological import permit.

“He then said that he was already aware of such possibility of not being qualified for such zoological permit.]

“He then asked me whether there was any other way of getting cheetahs, of a different kind of a permit.

“I then told him that it was my intention to apply for a commercial permit for twenty cheetahs for Wild Kingdom in Orlando, Florida, later in the summer.

“I told him also that it is the privilege of the permittee, in this case the permittee of the commercial permit, to ask if the permit has been issued, request permission for whatever reason there might be——

“Q. From whom?

“A. From U.S.D.I. From U.S.D.I., for whatever reason it might be a year later, six months later, to sell one or more of the permitted animals, in this case cheetahs, to somebody else.

“That privilege is printed on the permit.

“I told him also——

"Q. *What is the substance of the information?*

"A. *I told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovell, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the Endangered Species list.*

"*Since we didn't have such a contract, since he didn't and I didn't have such a contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.*

"*He then asked me what if I sign a contract dated in March. And I said 'Sorry, that can't be done.'*

[**"The conversation ended by me telling him that since he is in Phoenix, and identified myself as being in Tucson, Arizona, which is only sixty-five miles, seventy miles away. I advised him that I would be on the program in the Phoenix Zoo on an organized tour on Tuesday, April 18, and I suggested to him that if he wants to talk to me again he might take the opportunity of looking me up while we were at the Phoenix Zoo.**

[**"That was the end of the conversation.**

"Q. The telephone conversation?

"A. The telephone conversation.]*

*** At this point in the testimony at the first trial, there ensued two and one-third pages of questions and answers with regard to the petitioner's claim that Lovell and Gilbert unsuccessfully attempted to converse with the petitioner at the Arizona Inn and that the petitioner rushed off to catch a chartered bus which was going to the Phoenix Zoo. Significantly, the indictment, itself, does not contain that testimony and does not indicate that anything has been edited out of the transcript. The text set forth in the indictment, therefore, makes it appear as though the final question and answer had reference to the content of the telephone conversation.**

"Q. *Did you ever state to Mr. Lovell that there were two ways he could get a cheetah through you, and then did you say to him that one way was that you had an order of cheetah coming in for Lion Country Safari and that you could siphon off two animals from that order for them or you could date back the order? Did you ever say that in substance or in words?*

A. *No, sir.*"

E. The Pre-Trial Motions

By written motions (A. 21), the defense moved, *inter alia*, for a dismissal of the indictment upon the distinct grounds that: (1) the manner in which the government had edited the petitioner's actual testimony for inclusion in the indictment constituted a concealment of the true facts from the grand jury; and (2) the version of the testimony included in the indictment left the defense unable to determine what portions of the petitioner's testimony were claimed to be perjurious.

In a written response, government counsel acknowledged the truth of the last of these complaints and proposed a remedy as follows:

> "Defendant has moved to dismiss Count Two of the indictment on the ground, *inter alia*, that it is deficient in certain technical respects. One of those respects is that the indictment does not sufficiently identify that portion of this testimony quoted in Count Two claimed to be false. In drafting the indictment, certain prefatory material was included in the belief that it would make clearer that portion of defendant's testimony that was materially false. In light of defendant's motion the government now realizes that this has not happened and consents to dismiss the first 10 paragraphs of quoted testimony as 'surplusage'. A

> copy of the indictment redacted in the suggested fashion is annexed hereto as Exhibit E. As is explained more fully in the government's memorandum of law, the redacted indictment should eliminate any question defendant may have had concerning which portion of his testimony is deemed to be false.

The memorandum of law submitted with the government's response further explained the government's amendment theory:

> "* * * The substance of what remains [after the amendment] is that the defendant told the government's two witnesses that he could not help them unless they had had a contract with him prior to March 30, 1972, and that they then asked him to backdate a contract to before that date, which he refused to do. It is this testimony the government claims is false. Viewed in light of the foregoing, defendant's first point no longer (if it ever did) has any merit.
>
> "The portion of Count Two remaining after the 'surplusage' has been struck joins two statements made by defendant on the same subject at slightly separate times in his direct testimony. See the transcript of the first trial, pp. 337-338 and 341. The intervening material was irrelevant and was eliminated so as to make that portion of defendant's testimony which the government believed false absolutely clear. This type of recomposition is entirely proper and does not invalidate an indictment. * * *" (A. 104).

In a written reply, the defense rejected and opposed the government's offer to amend the indictment, arguing that such material cannot be treated as 'surplusage' and

that no warrant exists under law for such an amendment (A. 113).*

The Court denied the various defense motions which were predicated upon the grounds stated *supra* (A. 235). Additionally, after hearing extended defense opposition to an amendment of the indictment (A. 224-236; 328-344), the Court granted the government's motion to amend the indictment by striking the first ten paragraphs (A. 341). During the course of the argument, the government contended that the stricken matter was "immaterial", and it explicitly so stated in its bill of particulars (A. 227, 230-1, 328-9). The defense argued that, if such be true, it is a further ground for dismissal of the indictment since the grand jury has improperly been presented with specifications of perjury containing concededly immaterial matter (329). That motion was also denied.

In the course of granting the prosecution's motion, the Court noted:

> "I want there to be no prejudice and no undue confusion presented to this jury. I think in its present form the count will engender a certain amount of confusion.
>
> "Now it may be that the defense feels that confusion is in the interest of the defendant——
>
> "[Defense Counsel]: Not at all, sir.
>
> "The Court: —if that is the case, I would suggest that in the interest of justice at this point,

* Although trial counsel specifically objected to the redaction of the indictment, he could not anticipate that government counsel would utilize the redaction for the purpose of placing the petitioner's testimony within the context of an altogether different conversation. Indeed, as the trial proceeded and went to its conclusion, no one, perhaps not even the government, seems to have realized that this misdirection had taken place.

since we are going to trial before a trial jury, require redaction. * * *" (A. 333-4).*

Reasons for Granting the Writ

This petition raises several important questions with respect to the right of a defendant to be tried upon an indictment returned by a grand jury, as guaranteed by the Fifth Amendment of the United States Constitution. In 1970, the United States Congress substantially liberalized the evidentiary requirements in perjury prosecutions. 18 U.S.C. § 1623(e), the statute under which petitioner was convicted, eliminated the traditional rule that in perjury prosecutions one prosecution witness, without corroborating circumstances, would not suffice to convict.**

In *Bronston* v. *United States*, 409 U.S. 352 (1973), a prosecution brought under the more restrictive perjury statute, 18 U.S.C. § 1621, this Court underscored the point that prosecutions for perjury may not be founded upon loosely or carelessly framed questions. Petitioner respectfully submits that a similar, but more objectionable situation occurred in the present case. By an amendment of the indictment, over the objection of the defense, the government was able to wrench petitioner's testimony out of its true context and into an altogether different context.

Although Congress has liberalized the evidentiary standards relating to perjury prosecutions, the judicial concern which led to the development of those standards

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* In this regard, it is significant that the trial court rejected the defense contention that the grand jury had been misguided by the government's presentation to it of an indictment containing a version of the petitioner's testimony which did not reveal it to be edited; but, in ordering the amendment of the indictment, "in the interests of justice", held that the indictment, as originally returned, would engender confusion on the part of the trial jury.

** For a history of the corroboration rule, *see*: *Wigmore on Evidence* (3rd Ed.), §§ 2040-2048.

should, nonetheless, prompt a particular vigilance in order to safeguard the fairness of such prosecutions. The amendment of the indictment and the consequent distortion of the testimony herein should not be countenanced. Similarly, the fairness of this prosecution was prejudicially compromised when the prosecutor, in summation, wrongfully vouched for the credibility of his witness, placed his own credibility in issue, and resorted to alleged facts not in the record.

I. The petitioner's right to be tried only upon the charges of a grand jury indictment was violated by: (1) the deceptive and misleading manner in which the indictment was drafted for presentation to the grand jury, and (2) the trial court's amendment of the indictment, at the request of the prosecution, and over the objection of the defense.

We have set forth *supra*, at pp. 10-13, and in Appendix E, *infra*, p. 18a, the petitioner's actual trial testimony from which the specification of perjury was taken. We have demonstrated the manner in which the testimony was edited for inclusion in the indictment upon which two grand juries voted, one of which returning a "no true bill". By failing to indicate that anything had been edited out of the petitioner's testimony, the government made it appear as though that testimony simply concerned a telephone conversation. From the indictment, one would never know that there was a conversation at the Arizona Inn.

The telephone conversation was only with Lovell. As the government, itself, contended in its written response to the petitioner's motions (*supra*, pp. 13-14), the proposed amendment was geared to alter the ambiguity of the indictment with the purpose of shifting the focus to the later *meeting* of the petitioner with *Lovell and Gilbert*. There was thus presented the situation of an already de-

ceptive indictment being made more deceptive by means of amendment. From a reading of the redacted indictment, one would never know that there had been a telephone conversation.

The shift in focus accomplished by the redacted indictment, away from the telephone conversation and to the Arizona Inn conversation, is overwhelmingly demonstrated by its clear effect upon both the trial judge and the trial jury. Both of the petitioner's answers, as contained in the redacted indictment were treated as though they were his versions of the conversation at the Arizona Inn:

(1) It will be recalled that Frank Gilbert was unable to recall the substance of the conversation at the Arizona Inn. He had not been a party to the telephone conversation (*supra*, p. 8). Nevertheless, over defense objection, the prosecutor was permitted to read to Gilbert the first of the two answers by petitioner as contained in the redacted indictment. That answer was petitioner's exculpatory version of the telephone conversation.* The

* "Q. Mr. Gilbert, directing your attention back to this conversation you had with the defendant in the Arizona Inn I ask you did the defendant ever state to you in words or substance the following 'I' referring to defendant 'told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovell, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the endangered species list.

'Since we didn't have such a contract, since he didn't and I didn't have such contract, I told him it was unlikely that such permission, after I received the permit of, let's use the words, switching animals, would be granted.

'He then asked me what if I sign a contract dated in March. And I said "Sorry, that can't be done."' "

"A. I don't recall such conversation" (A. 711-712).

Gilbert's answer thus falsely appeared to contradict petitioner's version of events. The redaction of the indictment led every one at trial down the garden path of overlooking the redacted material, which would have shown that the petitioner's answer related to the telephone conversation.

Court explained its ruling by stating to the prosecutor: "* * * I will permit you to inquire of the witness whether Zeehandelaar on April 15, 1972 made those statements" (A. 709).

(2) In marshalling the evidence as to Lovell's trial testimony, the Court completely omitted any reference to Lovell's denials of petitioner's version of the telephone conversation (Lovell's testimony at A. 454-5; Court's charge at A. 1178-9);

(3) In reading the redacted version of the indictment to the jury, during the course of the charge, the Court failed to indicate that the first question and answer related only to the telephone conversation (A. 1193);

(4) shortly after retiring to deliberate, the trial jury requested and received a copy of the redacted indictment;

(5) both requests of the trial jury for the reading of testimony were limited to occurrences at the Arizona Inn (A. 1224, 1234).

By redacting the indictment, the Court not only struck those questions and answers which may have prompted the grand jury to indict, but also shifted the thrust of the indictment from one conversation to another. Any reasonable interpretation compels the conclusion that the petitioner was not, in fact, tried upon the indictment returned against him by the grand jury.

The grand jury is interposed "to afford a safeguard against oppressive actions of the prosecutor or a Court." *United States* v. *Cox*, 342 F.2d 167, 170 (5th Cir.), *cert. denied*, *sub nom Cox* v. *Haubert*, 381 U.S. 935 (1965). The content of the charge, as well as the decision to charge at all, should be entirely up to the grand jury. The practices followed in the present case, make a mockery of the Fifth Amendment requirement and of the grand jury.

The wording of the specification of perjury in the indictment, constituted a substantial and clear fraud upon the grand jury. It misled the grand jury into believing that it was indicting with respect to the testimony concerning one conversation, although it was the prosecutor's intention, as revealed by his later, successful motion to amend the indictment, to prosecute the petitioner based upon a different conversation. Whatever description is given to this state of affairs, it far surpasses the "confusion" that required a reversal of petitioner's prior conviction.

In reversing the petitioner's original conviction, the Court of Appeals said:

> "Rule 7(c) of the Federal Rules of Criminal Procedure provides that an indictment should contain 'a plain, concise, and definite written statement of the essential facts constituting the offense charged.' The rule reflects the oft-stated principle that an indictment is defective if it fails to apprise the accused 'with reasonable certainty, of the nature of the accusations against him' [Footnote and citations omitted]. The indictment here clearly failed to do so." (*United States* v. *Zeehandelaar*, 498 F.2d 352 at 356; 12a).

The Court further noted:

> "An indictment drawn with reasonable certainty assures that the defendant will not be tried or convicted for an offense other than the one for which he was indicted by the grand jury, that the defendant will be able to prepare an adequate defense and to address himself to the relevant questions of fact and law, that the Trial Court will be able to determine that the jury's verdict rests on substantial evidence, that an appellate court's affirmance will not be for a crime other than the one

> for which defendant was convicted, and that the defendant will not face the prospect of being placed twice in jeopardy. *See generally*: *Russell* v. *United States*, 369 U.S. 749 (1962)." (498 F.2d at 356, fn. 1; fn. at 12a).

It is incredible that, faced with such a specific admonition, from the Court, the government saw fit to play fast and loose with the wording of the indictment in a manner which must have misdirected the grand jury and clearly misdirected the trial jury.

Rule 6(f) of the Federal Rules of Criminal Procedure provides:

> "An indictment may be found only upon the concurrence of twelve or more jurors."

Rule 6(c) emphasizes the requirement that twelve jurors shall "find" each indictment by its provision that the foreman "shall keep a record of the number of jurors concurring in the finding of every indictment * * * ". The requirement of the Criminal Rules that every indictment must be "found" by at least twelve grand jurors is a further specification of the Fifth Amendment's command that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury * * *."

The sweeping powers of the grand jury over the terms of the indictment entail very strict limitations upon the power of the prosecutor or the Court to change the indictment found by the jurors, or to prove at trial facts different from those charged in the indictment. Since the grand jury has unreviewable power to refuse indictment and to alter a proposed indictment, proof at trial of facts different from those charged cannot be justified on the ground that the same facts were before the grand jury and that the jurors might or even should have charged them.

This Court's decisions on amendment of the indictment support these principles as necessary inferences from the guarantee of indictment by a grand jury. In the leading case of *Ex parte Bain*, 121 U.S. 1 (1887), the defendant, an officer of a banking association, was charged with making a false report "with intent to deceive the *comptroller of the currency and* the agent appointed to examine the affairs of said association" (121 U.S. at 4; emphasis added). On motion by the government, the trial court ordered the italicized words struck out as surplusage. This Court set the conviction aside. In reply to the Trial Judge's argument, "that the grand jury would have found the indictment without this language," the Court stated:

> "* * * but it is not for the Court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument * * * [H]ow can it be said that, with these words stricken out, it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggest the changes, the great importance which the common law attaches to an indictment by a grand jury as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer' may be frittered away until its value is almost destroyed." (121 U.S. at 9-10).

This Court has continued to adhere to the *Bain* principle in recent years. In *Stirone* v. *United States*, 361 U.S. 212 (1960), the grand jury charged a violation of the Hobbs Act. It found that the interstate commerce affected

was the victim's shipment of sand from various other states to his plant in Pennsylvania. The trial judge allowed the government to introduce evidence of interstate commerce other than that charged—i.e., the movement of finished steel from the victim's plant outward to other states. The Court set aside the conviction, holding that the proof at trial of these uncharged facts, amounted to an amendment of the indictment with respect to the element of interstate commerce. *Stirone* relied on *Bain*, and quoted extensively from the passage set out *supra*. The Court stated, *inter alia*:

> "The *Bain* case, which has never been disapproved, stands for the rule that a Court cannot permit a defendant to be tried on charges that are not made in the indictment against him." (361 U.S. at 217).

In *Russell* v. *United States*, 369 U.S. 749 (1962), it was held that a bill of particulars cannot cure a fatally imprecise indictment. The bill of particulars only serves the function of appraising the accused of the charges and protecting him against future jeopardy, but it does not preserve his right to be tried on a charge found by a grand jury. The Court again cited the passage from *Bain* (369 U.S. at 770-1), referred to the "settled rule in the Federal Courts that an indictment may not be amended except by submission to the grand jury, unless the charge is merely a matter of form" (369 U.S. at 770) and stated:

> "* * * to allow the prosecutor or the Court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guarantee of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the

> basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him * * *" (369 U.S. at 770).

In *Bain*, *Stirone* and *Russell*, this Court has shown that it takes seriously and requires to be enforced rigorously, the Fifth Amendment's command that a defendant to a charge of "infamous crime" be tried only on "indictment of a grand jury." Similarly, the lower Federal Courts have made clear that an amendment in the substance of an indictment will not be tolerated. *United States* v. *Dodge*, 258 F. 300, 305 (2d Cir. 1919); *United States* v. *Consolidated Laundries*, 291 F.2d 563, 571-2 (2d Cir., 1961); *United States* v. *Cirami*, 510 F.2d 69 (2d Cir., 1973); *United States* v. *Gammil*, 421 F.2d 185, 186 (10th Cir. 1970); *Carney* v. *United States*, 163 F.2d 784 (9th Cir. 1947); *Edgarton* v. *United States*, 143 F.2d 657 (9th Cir. 1944); *United States* v. *Critchley*, 353 F.2d 358 (3d Cir. 1965); *United States* v. *Anzelmo*, 319 F. Supp. 1106, 1125-6 (E.D. La. 1970); *United States* v. *Williams*, 412 F.2d 625 (3d Cir. 1969); *Horsley* v. *Alvis*, 281 F.2d 440 (6th Cir. 1960).

It is respectfully submitted that the perversion of the petitioner's testimony which was accomplished, first by its undisclosed editing in the indictment, and then by the trial court's amendment of the indictment, deprived petitioner of his right to indictment by a grand jury and constituted a clear violation of due process of law.

II. The petitioner was deprived of a fair trial and of the Fifth Amendment right against self-incrimination when, in summation, the prosecutor placed his own credibility in issue, vouched for the credibility of prosecution witnesses, resorted to alleged facts not in the record, and effectively commented upon the petitioner's failure to testify.

In his summation, the prosecutor argued that the petitioner had a motive to lie, whereas the government's witnesses did not have such a motive because "they were not involved in the prior case. They were not the subjects of investigation, and they were not the defendant" (A. 1146). The prosecutor further vouched for the credibility of his witnesses by arguing, without any support in the record, that those witnesses had "no criminal record, no prior involvement with the law" (A. 1145).

Additionally, the prosecutor continually asserted in summation that the government's witnesses had not been contradicted and that they had been the only witnesses "who testified here in front of you"—an implicit contrast to petitioner, who did not testify (A. 1132, 1142, 1151).

Not content with having thus improperly vouched for the credibility of his witnesses, the prosecutor repeatedly asserted that their testimony was true (A. 1124).

Defense motions for a mistrial and for a remedial instruction were all denied in all respects with regard to each of the above noted improper comments of the prosecutor (A. 1146, 1154, 1164).

It is respectfully submitted that this barage of prosecutorial misconduct deprived the petitioner of a fair trial, and the falure of the trial court to restrain the prosecutor or to give a curative instruction, made that deprivation

a certainty. *Berger* v. *United States*, 295 U.S. 78, 88 (1934); *Handford* v. *United States*, 249 F.2d 295, 296 (5th Cir., 1957); *Hall* v. *United States*, 419 F.2d 582 (5th Cir., 1969); *Harris* v. *United States*, 402 F.2d 656 (D.C. Cir., 1968); *Dunn* v. *United States*, 307 F.2d 883 (5th Cir., 1962).

III. The concededly illegal portion of the sentence imposed upon the petitioner is void. Any attempt to substitute in its place a fine not contained in the original sentence would constitute an impermissible increase of the valid portion of the original sentence.

The order of the Court of Appeals which affirmed the judgment of conviction herein in other respects, also provided that:

> "[I]t was improper for the trial court to order appellant to pay a sum to the Department of Interior, 'which shall be used in connection with the preservation of endangered species. . . .' Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed five thousand dollars, the amount of the contribution originally imposed" (Appendix A hereto).*

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* Pursuant to the remand order of the Court of Appeals, the petitioner was re-sentenced in the District Court on August 6, 1975. The District Court did, in fact, impose a $5,000 fine in place of the $5,000 illegal contribution. A notice of appeal to the Court of Appeals has been filed, and it is anticipated that the Court of Appeals will expedite its determination so that a complete record will be before this Court for consideration with the instant petition.

It is respectfully submitted that the only remedy available for the correction of the sentence is the deletion of that part of it which was illegal. A conversion of the illegal $5,000 fine would be an impermissible increase in the valid portion of the sentence. *See*: *North Carolina* v. *Pearce*, 395 U.S. 711 (1969); *Owensby* v. *United States*, 385 F.2d 58 (10th Cir., 1967) and *Pugliese* v. *United States*, 353 F.2d 514 (1st Cir., 1965).

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted, and the judgment of conviction should be reversed; alternatively, this Court should vacate that portion of the order of the Court of Appeals which authorizes the imposition of a fine of up to $5,000.

Respectfully submitted,

JAC M. WOLFF
HENRY J. BOITEL
Attorneys for Petitioner

August, 1975

APPENDICES

APPENDIX A

(Order of Affirmance)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-1026

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 7th day of May, one thousand nine hundred and seventy-five.

Present:

J. EDWARD LUMBARD
PAUL R. HAYS
WILLIAM HUGHES MULLIGAN
Circuit Judges

UNITED STATES OF AMERICA,

Appellee,

—against—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Appendix A—Order of Affirmance

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed except as to the sentence imposed. None of the other arguments raised on appeal has merit; however, it was improper for the trial court to order appellant to pay a sum to the Department of Interior, "which shall be used in connection with the preservation of endangered species. . . ." Such a forced contribution is an improper sentence. Accordingly, we affirm in all respects except as to the sentence imposed, and we remand to the lower court solely for resentencing; any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed.

/s/ J. EDWARD LUMBARD
J. EDWARD LUMBARD

/s/ PAUL R. HAYS
PAUL R. HAYS

/s/ WILLIAM HUGHES MULLIGAN,
WILLIAM HUGHES MULLIGAN, USCJs

APPENDIX B

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

75-1026

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and seventy-five.

Present:

HON. J. EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. WILLIAM H. MULLIGAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRED J. ZEEHANDELAAR,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

APPENDIX C

Order of the Court of Appeals Denying Rehearing *en banc*

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

75-1026

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-third day of July, one thousand nine hundred and seventy-five.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

FRED J. ZEEHANDELAAR,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard *en banc* having been filed herein by counsel for the appellant, Fred J. Zeehandelaar, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN,

IRVING R. KAUFMAN,
Chief Judge.

APPENDIX D

Opinion of the Court of Appeals Reversing Prior Conviction (498 F.2d 352)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

No. 781, Docket 73-2703

Argued Feb. 20, 1974

Decided May 15, 1974

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRED J. ZEEHANDELAAR,

Defendant-Appellant.

Anne Sidamon-Eristoff, Asst. U.S. Atty. (Paul J. Curran, U.S. Atty. S.D., New York, and John D. Gordan III, Asst. U.S. Atty., on the brief), for appellee.

Jac M. Wolff, New York City, for defendant-appellant.

Before LUMBARD, FRIENDLY, and TIMBERS, Circuit Judges.

LUMBARD, Circuit Judge:

After a five-day jury trial in the Southern District, Fred J. Zeehandelaar was found guilty on October 3, 1973 of violating 18 U.S.C. § 1001 by submitting false documents to the Department of Interior, Bureau of Sport Fisheries and Wildlife. He was fined $5000 and sen-

tenced to one year's imprisonment, with execution of sentence suspended as to all but three months, the remainder to be served on probation. On appeal, Zeehandelaar maintains that there was insufficient evidence to sustain his conviction, that highly prejudicial hearsay testimony was erroneously admitted into evidence, and that there were various irregularities in the process by which the jury reached tis verdict. We reverse.

On December 14, 1971, Zeehandelaar, an importer of wild animals, met with Stanley Brock, general manager of Wild Kingdom, Inc., an animal farm then being built in Orlando, Florida, to arrange for the importation of a variety of wild animals, including twenty cheetahs. At this meeting, Zeehandelaar stated that the cheetah was about to be placed on the Endangered Species List, after which time imports would no longer be permitted, except in instances of economic hardship as where it could be shown that there was a pre-existing importation contract. Zeehandelaar emphasized to Brock that "a firm contract prior to listing" of the cheetah as an endangered species would thus be crucial. Brock placed an order on January 7, 1972. In a letter dated January 12, 1972, Zeehandelaar confirmed the order and included invoices for each of several species requested by Wild Kingdom. An invoice for twenty cheetahs indicated a purchase price of $35,000 duty paid, and a required advance payment of 25% or $8,750.

On February 1, 1972, Zeehandelaar attended a meeting of the National Council of Animal Transportation in Washington, D.C. While there, he inquired of Bernolt Palas, the Chief of Permits of the Bureau of Sport Fisheries and Wildlife, whether there was "anything new

on the matter of endangered species." Palas informed Zeehandelaar that the Secretary of the Interior was about to sign a Notice of Proposed Rule-Making, which would declare the Department's intention of placing the cheetah on the Endangered Species List after a brief period of public comment.

According to Palas, a government witness at the trial, the Notice of Proposed Rule-Making was itself quite significant because permits were generally not issued even in cases in which an importation contract was entered into prior to the placing of an animal on the Endangered Species List, if this occurred *after* the publication of the Notice of Proposed Rule-Making. Such a policy had the function of discouraging massive efforts to circumvent the regulation once the Department's intention became known and at the same time served to put importers on notice not to enter into any further importation agreements.

Palas testified that after speaking with Zeehandelaar he called the Department of Interior and was informed that the Secretary had already signed the Notice of Proposed Rule-Making. He then relayed this information to Zeehandelaar. On February 3, he met again with the appellant and supplied him with the Notice, which was published that same day in the Federal Register. The government also introduced into evidence a letter dated February 22, 1972, sent by the appellant to Palas regarding a permit for the importation of snow leopards, also listed in the February 2 Notice as a soon to be declared endangered species. In the letter, Zeehandelaar wrote that the dates of the orders for snow leopards "needless to say . . . are prior to February 3, 1972 (date proposed amendment was published in the Federal Register)."

Appendix D—Opinion of the Court of Appeals Reversing Prior Conviction (498 F.2d 352)

When Zeehandelaar took the stand, he denied that Palas had on February 1 told him anything more than that a Notice of Proposed Rule-Making would shortly be signed. He claimed not to have learned of the signing of the Notice until February 7. Further, he denied having met with Palas on February 3. Documentary evidence was introduced which established that on that date, the appellant was in Orlando, Florida. Indeed, Zeehandelaar testified that after the meeting in Washington, D.C. on February 1, he immediately flew to Florida to complete the deal with Wild Kingdom. Either on February 2 or February 3, he met with Brock and typed a letter which he had Brock sign. This letter, back dated to January 17, purported to be a "firm order" by Wild Kingdom for twenty cheetahs. The letter stated that a check was enclosed for "advance financing as agreed." In fact, it was not until February 9 that a check was actually drawn payable to Zeehandelaar. This check was also back dated to January 17. . .

On February 7, several days after this meeting with Brock and before the check had been drawn, Zeehandelaar wrote Palas, declaring an intention to apply for a commercial permit to import cheetahs. In his letter, the appellant noted that "[o]n January 17, 1972 the order [for the cheetahs] was confirmed in writing with a check for 25% of sales value as deposit."

Zeehandelaar testified that the letter and check had been back dated to January 17 because on or about that date Brock received the appellant's confirmation letter of January 11 with invoices enclosed and because on January 17 they had reconfirmed the order over the phone. As for the letter of February 22 relating to the

importation of snow leopards, in which he indicated knowledge of the significance of the February 3 date, the appellant testified that only after February 7, 1972, in a conversation with Palas, did he first learn the importance of having a contract before February 3.

On March 30, 1972, the cheetah was officially placed on the Endangered Species List and its importation was prohibited. Melvin Lovell, a government witness, testified that shortly thereafter, on April 15, he met with Zeehandelaar for about fifteen minutes at the Arizona Inn, in Tucson, Arizona, and was told that although importation of the cheetah had been banned, "we could back date the order" and thereby come within the economic hardship exception for cases involving pre-existing contracts.

Zeehandelaar denied categorically that any such meeting had taken place. Instead, he testified to a telephone call from Lovell, during which the latter broached the question of back dating, to which Zeehandelaar responded: "Sorry, that can't be done." In rebuttal, the government called Frank Gilbert and Suzanne Pressman. Gilbert testified that he had been present in Tucson when Zeehandelaar met with Lovell and he corroborated Lovell's account of his conversation. Suzanne Pressman, employee of the Humane Society of the United States, also corroborated Lovell's testimony, although she had not been present and had only heard about the meeting with Zeehandelaar second hand from Lovell later in the day on April 15 while riding in an automobile with Lovell, Gilbert, and their wives.

In a letter dated June 8, 1972, Zeehandelaar formally applied for a permit to import twenty cheetahs from

Southwest Africa. Attached to his application were the letter he had typed and Brock had signed on February 2 or February 3, and the deposit check drawn February 9, both back dated to January 17. Although Zeehandelaar at no time in his letter expressly stated that these documents had actually been completed on January 17, he did stated that, "[w]e were holding a bona fide order . . . confirmed in writing on January 17, 1972." Zeehandelaar further indicated that he had held a bona fide order "as described in our letter of 7 February 1972. . . ." As has been noted, the February 7 letter, which was enclosed with Zeehandelaar's application for a permit and the back dated letter and check, stated that "[o]n January 17, 1972 the order was confirmed in writing with a check for 25% of sales value as deposit."

The Bureau never acted on Zeehandelaar's application. On October 11, 1972, due to alleged financial considerations, he withdrew his application. Wild Kingdom's deposit was applied to the purchase price of the other animals which it had ordered and about whose importation no question of illegality had ever been raised. On December 6, 1972, Zeehandelaar was indicted and charged with knowingly making and using a false writing and document in violation of 18 U.S.C. § 1001 by enclosing with his application of June 8, 1972

> a photocopy of a check and letter both dated January 17, 1972, relating to an order from Wild Kingdom, Inc., for the purchase of said cheetahs and a 25% deposit on said order, and [representing] that said documents confirmed that he held a bona fide order on January 17, 1972, for the sale of said cheetahs, whereas in truth and in fact, as

the defendant then and there well knew, the said check dated January 17, 1972, had not been drawn until February 9, 1972, and he did not on January 17, 1972, have the contract as described in said application.

I.

Interpreting the indictment as charging that he misrepresented to the Bureau of Sport Fisheries and Wildlife that a bona fide contract was in existence on January 17, 1972, Zeehandelaar argues that insufficient evidence was presented at trial to sustain his conviction. He maintains that the undisputed evidence establishes that as of January 17, there was, in fact, a bona fide contract. In particular, he points to Stanley Brock's admission on cross-examination that as early as December 14, 1971 Wild Kingdom considered that it had entered into a firm commitment to purchase the twenty cheetahs, and that the deposit check drawn on February 9, 1972 actually represented a payment on account of the purchase price. Zeehandelaar's letter of January 11, 1972 confirming an order by Brock four days earlier, and accompanied by invoices setting forth purchase price and payment terms, is also relied upon as further support for appellant's assertion that there was a bona fide contract on January 17.

The government argues, however, that the indictment should be read as charging Zeehandelaar with not having had a contract "as described in [the] application" of June 8, 1972, even though he may have had a contract of some sort on that date. The government particularly emphasizes Zeehandelaar's statement in his application for a permit that on January 17 he had a contract evidenced by a "firm order" letter and a deposit check, although neither of these were actually in existence at the time.

Appendix D—Opinion of the Court of Appeals Reversing Prior Conviction (498 F.2d 352)

Rule 7(c) of the Federal Rules of Criminal Procedure provides that an indictment should contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." The rule reflects the oft-stated principle that an indictment is defective if it fails to apprise the accused "with reasonable certainty, of the nature of the accusation against him."[1] United States v. Simmons, 96 U.S. 360, 362, 24 L.Ed. 819 (1877). *See also* United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1875); Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962); United States v. Lamount, 18 F.R.D. 27 (S.D.N.Y. 1955), aff'd, 236 F.2d 312 (2d Cir. 1956). The indictment here clearly failed to do this.

Indeed, the confusion regarding the offense charged resulted in the government and appellant trying their cases based on quite distinct theories of the crime charged. This confusion regarding the indictment, however, was not limited to the parties, but infected the court and jury as well. Thus, although the court generally interpreted the indictment along the lines urged by the government, at the pretrial hearing on a defense motion to dismiss the indictment, the court endorsed defense counsel's char-

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[1] An indictment drawn with reasonable certainty assures that the defendant will not be tried or convicted for an offense other than the one for which he was indicted by the grand jury, that the defendant will be able to prepare an adequate defense and to address himself to the relevant questions of fact and law, that the trial court will be able to determine that the jury's verdict rests on substantial evidence, that an appellate court's affirmance will not be for a crime other than the one for which defendant was convicted, and that the defendant will not face the prospect of being placed twice in jeopardy. *See generally Russell* v. *United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed. 2d 240 (1962).

acterization of the indictment as charging, in essence, that Zeehandelaar had misrepresented that he had a bona fide contract on January 17. Relying on this statement by the court, Zeehandelaar prepared and presented his defense accordingly. Moreover, in its charge to the jury, the court failed to define precisely the offense charged and even suggested that Zeehandlaar could be convicted simply for having back dated the letter and the check attached to his application.

The court's confusion carried over to the jury, which throughout its deliberations evidenced considerable uncertainty as to the issue before it. Thus, at one point, jury note #6 was sent to the court asking whether the jury could "acknowledge the existence of a bona fide contract while still finding guilt in the application letter?" The court responded in the affirmative over the objection of Zeehandelaar's counsel.

Later, another question from the jury was addressed to the court, asking: "Can we separate guilt of predating January 17 letter stipulated February 3rd by attorney from application of permit." Because neither the court nor counsel fully understood this question the court requested clarification from the jury. Instead, the jury sent another note which appeared to be a verdict:

> We find Mr. Zeehandelaar guilty only of misrepresenting dates of contract and check submitted with his application—"but" we do believe he had a bona fide contract.

Defense counsel moved for a mistrial on the basis of an imperfect verdict. Although the jury's communication clearly revealed confusion and the misconception that

Zeehandelaar could be convicted simply for knowingly back dating the letter and deposit check, the court denied defense counsel's motion and sent back a note to the jury, asking: "Do you find the defendant guilty or innocent of the charges contained in the indictment?"

Once again, the jury returned an ambiguous, qualified verdict: "Yes, the defendant is guilty of the charge of falsifying application." The jury was then ordered back into the courtroom and a poll taken. Juror #3 answered in the negative in response to the question whether "the defendant [was] guilty as charged." Upon questioning, the juror revealed his confusion over the wording of the indictment. Only after persistent questioning in front of the other jurors and a suggestion that the jury be sent out for further deliberations did the juror change his vote back to "yes" on the question of Zeehandelaar's guilt.

In light of the substantial uncertainty as to the offense charged in the indictment, which pervaded the trial and the deliberations and verdict of the jury, we cannot say that Zeehandelaar had a fair trial.

II.

Additionally, the court erred in failing to give a limiting instruction with regard to the highly prejudicial hearsay testimony of Suzanne Pressman. On its direct case the government called Melvin Lovell, who testified to a meeting with Zeehandelaar in Tucson, Arizona on April 15 during which appellant allegedly suggested back dating an order as a means of obtaining a permit to import cheetahs. The defense raised on cross-examination the possibility that Lovell's testimony had been recently contrived in cooperation with the prosecution. After Zeehan-

delaar denied during the defense's case-in-chief that any meeting had occurred, the government called as a rebuttal witness, Frank Gilbert, who claimed to have been present at the April 15 meeting and to have heard Zeehandelaar suggest back dating. Once again, the defense suggested on cross-examination that testimony as to an April 15 meeting was a recent fabrication. The government then called a second rebuttal witness, Suzanne Pressman. Over the objection of defense counsel, Pressman was permitted to testify that on April 15 Lovell had recounted to her the conversation he had had with Zeehandelaar earlier that day, and that he had told her that the appellant had suggested back dating in the course of their conversation. Although the record shows that even the prosecution had recognized the need for a limiting instruction indicating to the jury that this testimony was being admitted solely as proof of prior consistent statements regarding the April 15 meeting, the court failed to give such an instruction. Moreover, in its summation of the evidence during its charge to the jury, the court treated Pressman's testimony as though it could be given the same testimonial effect as the testimony of Lovell and Gilbert. Again, no instruction was given as to the limited purpose for which it was admitted into evidence.

Although we have recognized the prior consistent statement exception to the hearsay rule when on cross-examination an attempt has been made to show that a witness' testimony is a recent fabrication, United States v. Zito, 467 F.2d 1401 (2d Cir. 1972), the court should give a proper limiting instruction with regard to such testimony. United States v. Lipton, 467 F.2d 1161, 1168 (2d Cir. 1972); United States v. DiLorenzo, 429 F.2d 216, 220 (2d Cir. 1970). Here, no such limiting instruction was given.

For the reasons stated, we reverse.

III.

Our reversal, however, in no way rests on one other argument made by Zeehandelaar, that the trial court improperly intruded into the deliberations of the jury. The appellant specifically contends that the court's interrogation of three jurors, two of whom had expressed an unwillingness to reconvene for a second day of deliberations at the hour suggested by the court and one of whom was opposed to reconvening at all, was improper. Each of these jurors was questioned individually in the robing room and in the course of the interrogation of one of them, juror #3, it was revealed to the court that the jury was deadlocked, with eleven jurors favoring a verdict of guilty and one juror opposed. Zeehandelaar maintains that these interrogations were coercive and that, in any event, once the court was informed of the division in the jury, it was required to declare a mistrial.

We have previously held that it is not improper for the trial court, in the exercise of its discretion, to interview individual members of a jury so long as counsel are present, as was the case here. *See* United States v. Berger, 433 F.2d 680, 686 (2d Cir. 1970), cert. denied, 401 U.S. 962, 91 S.Ct. 970, 28 L.Ed.2d 246 (1971). In light of the fact that one of the three jurors here was extremely agitated, the court's decision to question the jurors privately was a prudent decision. *Cf.* United States v. Colabella, 448 F.2d 1299, 1303-1304 (2d Cir. 1971), cert. denied, 405 U.S. 929, 92 S.Ct. 981, 30 L.Ed.2d 803 (1972). Moreover, we are not persuaded that the comments made to the jurors in the robing room were coercive or prejudicial. The fact that juror #3 revealed the division in the jury

was not by itself a ground for a mistrial, since this information had not been solicited in any way by the court. *See* United States v. Jennings, 471 F.2d 1310, 1313-1314 (2d Cir.), cert. denied, 411 U.S. 935, 93 S.Ct. 1909, 36 L.Ed.2d 395 (1973); United States v. Meyers, 410 F.2d 693, 697 (2d Cir.), cert. denied, 396 U.S. 835, 90 S.Ct. 93, 24 L.Ed.2d 86 (1969).

Reversed.

APPENDIX E

"CHART"

[*For the Convenience of Court and Counsel this Exhibit is printed on the opposite page.*]

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In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-277 and 75-515

FRED J. ZEEHANDELAAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that the grand jury was deceived into returning an indictment against him and that the redaction of the indictment by the district court denied him the right to be tried upon the indictment as found by the grand jury. Petitioner also claims that prosecutorial misconduct denied him a fair trial, and that the district court on remand illegally increased his sentence.

Petitioner is a dealer in wild animals. In a previous trial in the United States District Court for the Southern District of New York he was convicted of making a false statement, in violation of 18 U.S.C. 1001, in connection with an application to the Department of the Interior to import cheetahs into the United States. That conviction was reversed on appeal.[1] At the trial in that case the government offered evidence of similar acts by petitioner in the form of testimony from Melvin Lovell, an amateur wild animal breeder, that petitioner had suggested two illegal means by which Lovell could obtain cheetahs in circumvention of the restrictions of the Endangered Species Conservation Act of 1969[2] (by siphoning off animals legally imported under a previously granted Interior Department authorization, or by backdating contracts of sale to invoke hardship exemptions provided by the Act). Petitioner testified that Lovell, and not he, had proposed such illegal conduct.

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[1] The court of appeals ruled (its decision is reproduced at Appendix D of the petition in No. 75-277) that the indictment charging petitioner did not specify whether his false statement consisted of his representation that he had a contract for the purchase of cheetahs before they were noticed for listing as an Endangered Species (which petitioner argued he in fact had) or of his backdating certain documents (which he does not dispute, Pet. 6). *United States* v. *Zeehandelaar*, 498 F.2d 352 (C.A. 2).

[2] 16 U.S.C. 668aa *et seq.*, superseded by the Endangered Species Act of 1973, 16 U.S.C. (Supp. IV) 1531 *et seq.*

The instant case arises on the basis of this testimony, for which petitioner was charged and convicted, after jury trial in the Southern District of New York, of making a false material declaration at a prior trial, in violation of 18 U.S.C. 1623.[3] He was sentenced to one year of unsupervised probation and, as a condition of probation, ordered to pay $5,000 to the Department of the Interior for use in connection with the preservation of endangered species. The court of appeals affirmed his conviction without opinion but remanded to the district court for correction of sentence (Pet. No. 75-277 App. A). On remand the district court removed the condition of probation and imposed a $5,000 fine. The court of appeals affirmed the resentencing (Pet. No. 75-515 App. D).[4]

1. Petitioner's first contention is that, by editing his testimony from the previous trial, the government misled the grand jury into returning an indictment against him.

It is undisputed that petitioner and Lovell had two conversations, both on the same day, one by telephone and the other face-to-face at the Arizona Inn in Tucson. At the previous trial, Lovell had testified that petitioner suggested illegal evasions of

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[3] Petitioner was also reindicted for making a false statement to the Department of the Interior, but this charge was dismissed by the government at the close of trial in the instant case.

[4] Petitioner seeks review of the judgment affirming his conviction in No. 75-277 and of the judgment affirming the resentencing in No. 75-515.

the Endangered Species Conservation Act during the latter meeting, and that the telephone conversation was innocuous. Petitioner said that the meeting was innocuous and that Lovell suggested the illegality over the phone. At trial of the instant case Lovell repeated his version; petitioner did not testify.

Petitioner's testimony from the previous trial appeared in an edited version in the indictment. This version did not indicate that a face-to-face conversation followed the telephone call, but instead made it appear that petitioner's testimony about the telephone conversation included both the allegation of Lovell's illegal proposal and his own general denial of ever having suggested illegality himself.[5] Petitioner asserts (Pet. 9) that this editing deceived the grand jury into believing "that it was indicting the petitioner for perjurious testimony relating to his version of the telephone conversation" alone and that the indictment was therefore a nullity.

This claim is wholly without basis. The substance of the conflict between the testimony of the two men was over who, if either, had proposed unlawful

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[5] Petitioner's testimony at the previous trial, and the edited version of that testimony contained in the indictment, are shown on the chart at Appendix E of the petition in No. 75-277. We acknowledge, as we did on appeal (see our appellate brief at page 13, note), that complete accuracy would have been served had asterisks indicated the deletion of irrelevant matter. The failure so to indicate, however, was by no means calculated or intended to deceive the grand jury, as a review of the omitted testimony, none of which is favorable to petitioner or harmful to the government, will show. Nor was the grand jury in fact deceived, see text *infra*.

acts. Petitioner was charged with falsely declaring that Lovell had proposed criminal conduct and that he himself had not. Whether the falsity occurred during one or the other of two conversations, held within hours of each other, was of no significance. Thus there is no reasonable basis for saying that the grand jury was "deceived" into returning the indictment against petitioner.

Moreover, the corollary of petitioner's argument —that had the grand jury been expressly apprised of the full extent of petitioner's testimony it would not have indicted—is baseless, since the testimony omitted from the indictment contains no suggestion whatever that the testimony charged as perjury was not perjurious (and petitioner does not argue otherwise).

In short, petitioner's argument that the wording of the indictment deceived the grand jury is not sufficient to overcome the presumption of regularity concerning grand jury proceedings. *Costello* v. *United States*, 350 U.S. 359; *United States* v. *Nunan*, 236 F. 2d 576, 594 (C.A. 2), certiorari denied, 353 U.S. 912; *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 39 (C.A. 8), certiorari denied, 373 U.S. 904. The government did nothing more than delete certain portions of petitioner's testimony so as to eliminate irrelevant material. This was entirely proper and did not invalidate the indictment. *United States* v. *Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1248-1249 (C.A. 5), certiorari denied, 414 U.S. 832; *United States* v. *Rook*, 424 F.2d 403, 405 (C.A. 7), certiorari denied, 398 U.S. 966.

2. Petitioner claims next that the redaction of the indictment by the district court deprived him of his Fifth Amendment right to be tried on the indictment returned by the grand jury. But the redaction did not materially alter the indictment any more than the edited version appearing in the indictment altered petitioner's trial testimony in any relevant manner.

The redaction by the court came about as a result of petitioner's motion to dismiss the indictment on the ground that its allegations were too imprecise to enable him to prepare a defense (A21-A22).[6] In response, the government proposed deleting those portions of the indictment that were irrelevant to the charge that petitioner had testified falsely when he said that Lovell and not he had proposed illegal evasion of the Endangered Species Conservation Act. Petitioner now argues that in redacting the indictment to give it greater precision the trial court impermissibly amended it, in derogation of this Court's decisions in *Ex Parte Bain*, 121 U.S. 1, and *Stirone* v. *United States*, 361 U.S. 212.

Those cases do not forbid immaterial alteration or narrowing of indictments, however, and thus do not support petitioner's argument. As the Court said in *Stirone* (361 U.S. at 215-217), "Ever since [*Bain*] was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. * * * The *Bain* case,

[6] The indictment as redacted also appears at Appendix E of the petition in No. 75-277. "A" refers to petitioner's Appendix filed in the court of appeals.

which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

The material here omitted by the district court can in no wise be said either to have broadened the charge against petitioner or to have added charges not made in the indictment as it originally was issued. Only inconsequential, background testimony was deleted, and the district court's decision to strike this prefatory matter was simple recognition that it was not materially false and that, consequently, it was unnecessary to the indictment. In so doing the district court was not impermissibly "second-guessing" the grand jury. The stricken testimony was superfluous, its elimination did not create a material change in the indictment, and there is no likelihood whatever that the indictment would not have been voted without it. *See United States* v. *Cirami*, 510 F.2d 69, 73 (C.A. 2); *United States* v. *Colasurdo*, 453 F. 2d 585 (C.A. 2), certiorari denied, 406 U.S. 917.

Moreover, contrary to petitioner's assertion, the excision of this surplusage cannot be said to have misled the trial jury as to the context of the questions and answers set forth as perjurious, since petitioner's testimony at his first trial concerning his dealings with Lovell was read to the trial jury in its entirety (A977-A985).[7]

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[7] For this reason also there is no merit to petitioner's suggestion (Pet. 18, note) that the redaction prejudiced him in connection with the testimony of Frank Gilbert, an associate

In sum, the redaction of the indictment was "merely a matter of form" (*Russell* v. *United States*, 369 U.S. 749, 770) and did not alter the focus of the issues to be resolved. That focus was initially and remained throughout the trial on the question whether petitioner testified falsely at his previous trial when he said that Lovell and not he proposed that certain illegal actions be taken in order to import cheetahs into the United States. The truth or falsity of petitioner's testimony was the question to be resolved by the jury, not whether the critical statements in issue had occurred at one conversation with Lovell or at another several hours later.

3. Petitioner's assertions of prosecutorial misconduct (Pet. 25-26) are also wide of the mark. In explaining why Lovell and Gilbert remembered their encounter with petitioner, the prosecutor stated (A 1145):

> And why do they remember that [conversation]? Because these men have no criminal record, no prior involvement with the law, they are intelligent people, and for somebody to come up to

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of Lovell's. Petitioner had said that Lovell had suggested illegal evasion of the law during the telephone conversation, to which Gilbert was not a party, but the question by the prosecutor whether Gilbert recalled such a suggestion emanating from Lovell was designed to test his recollection whether Lovell had at any time proposed backdating documents to deceive the Department of the Interior. In any event, petitioner's entire testimony in this regard was read to the jury, and Gilbert's testimony thus did not "falsely appear" to contradict petitioner.

> them and propose that they do something illegal was surprising and shocking, and they remember it.

Although neither witness had been asked specifically at trial whether he had a criminal record, the prosecutor's statement was a reasonable inference from testimony given. Defense counsel had questioned the government witnesses on various alleged minor misdeeds but had failed to uncover any criminal record [8] Nevertheless, when defense counsel objected the prosecutor cautioned the jury that "more correctly put, [there was] an absence of proof" (A1146) of any criminal records, thereby curing any error there might have been.

Nor did the prosecutor comment upon petitioner's failure to testify. From 30 pages of transcript petitioner culls three remarks of the prosecutor upon which he bases his claim:

> What is the version of what happened by the witnesses who testified here in front of you? [A1132-A1133.]
>
> So the case boils down to, really, do you believe these witnesses who testified here? [A1142.]

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[8] For example, defense counsel questioned Lovell about his practicing as an electrical engineer despite his lack of an engineering degree (A524-A525) and his alleged failure to make child support payments (A540-A544). The defense also pointed out that Sue Pressman, another government witness, had received mail addressed to her as Dr. S. Pressman although she did not hold either an M.D. or Ph.D. degree (A1011-A1017).

> The Government submits to you that based on the credibility of the witnesses in this case, none of which were contradicted in any way whatsoever * * * [A1152.]

There was nothing in these isolated comments which the jury would naturally or necessarily interpret as a comment on petitioner's silence. See *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (C.A. 2), certiorari denied, 419 U.S. 873. Petitioner had already given his version of events at the earlier trial, and the purpose of the trial was to contrast and compare that version with the version told by the government's witnesses. All of the comments referred to above did no more than invite this comparison. The reference to the absence of contradiction was not a comment on petitioner's silence, for his version of events clearly did contradict the testimony of the government's witnesses; rather, this remark was intended to draw the jury's attention to the consistency of testimony given by those witnesses. Any misapprehension that the jury might have had on this account was in any event corrected by the district court's instruction that no inference was to be drawn against petitioner for his failure to testify (A1185).

4. Petitioner's final claim is that the district court on remand illegally increased his sentence. Initially the court sentenced petitioner to one year of unsupervised probation and, as a condition of probation, ordered him to pay $5,000 to the Department of the Interior for use in connection with the Endangered Species program. The court of appeals ruled

(Pet. App. A, p. 2a) that "[s]uch a forced contribution is an improper sentence" and remanded for resentencing with the instruction that "any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed." The district court thereupon imposed a $5,000 fine, as the court of appeals had said it might.

Contrary to petitioner's claim (No. 75-515, p. 6), the resentencing did not violate *North Carolina* v. *Pearce*, 395 U.S. 711. That case held that due process requires "that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial" and that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" (*id.* at 725-726). Here there can be no question of vindictiveness, for petitioner's punishment was not increased in the sense contemplated by *Pearce*.[9] Following the first sentencing petitioner faced a choice of paying $5,000 or sacrificing his probation to possible imprisonment. Following the resentencing petitioner remained in effect in the same position. The sole practical difference lay not in the punishment meted out but in the recipient of the money. It is no more onerous for

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[9] Moreover, the revision of the sentence was within parameters dictated by the court of appeals and thus did not reflect the concern to which *Pearce* was addressed—possible vindictiveness by a trial judge resentful over a successful appeal. Cf. *Colten* v. *Kentucky*, 407 U.S. 104.

petitioner to pay $5,000 to the general treasury than to pay the same sum to the Department of the Interior and his argument that his sentence was illegally increased is thus without merit.[10]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

[10] *Ekberg* v. *United States*, 167 F.2d 380 (C.A. 1), cited by petitioner (No. 75-515, p. 6), is inapplicable. There a conviction on one count was reversed and the court of appeals said that the sentences on two other counts, valid when imposed, could not subsequently be altered. Here, by contrast, the court of appeals remanded, not so that a sentence valid when imposed might be altered, but for correction of an improper sentence on the only count on which petitioner was convicted. Nothing in *Ekberg* would prohibit the resentencing here.

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